

FAIR EMPLOYMENT & HOUSING COMMISSION

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MINUTES 459th COMMISSION MEETING

February 1, 2006
Hiram Johnson State Building
455 Golden Gate Avenue, Basement Auditorium
San Francisco, California

PRESENT:

Chairman George Woolverton, Commissioners Herschel Rosenthal, Linda Ng, Patrick Adams, and Brenda St. Hilaire; and Commission staff Ann Noel, Jo Anne Frankfurt, Caroline L. Hunt, Denise Choye, Cynthia Jones and Loc D. Tra; Senior Assistant Attorney General Louis Verdugo, Jr.; Department of Fair Employment and Housing (Department or DFEH) Director Suzanne Ambrose; and members of the public.

Chairman Woolverton called the meeting to order at 10:13 a.m.

OPEN SESSION**REVIEW OF THE MINUTES**

Chairman Woolverton moved, Commissioner Rosenthal seconded, and the Commission approved the Minutes and Transactions of the 458th meeting as submitted. (06-01)

COMMISSIONERS' REPORTS

The Commissioners and Acting Executive and Legal Affairs Secretary (ELAS) Ann Noel discussed Commission meeting scheduling for the rest of 2006. The Commission set dates for Commission meetings for April 25, June 6, August 29, and November 14 in Fresno, Los Angeles, San Diego and Sacramento, respectively.

ATTORNEY GENERAL'S REPORT

Deputy Attorney General Louis Verdugo Jr. introduced himself and discussed the work of the Civil Rights Enforcement section of the Attorney General's office.

Verdugo stated that in 2001, Attorney General Bill Lockyer determined that the Attorney General's (AG) office had not in the past reached out sufficiently to immigrant communities. Lockyer recognized that over a quarter of California's population is foreign born and that California is now a two language state. As a result, the AG has sought outreach to these

communities and identified issues that greatly impact them. One of the first issues identified was the problem of immigrant consultant fraud. The AG targeted 28 cases for prosecution over a period of 2 ½ to 3 years. The AG has filed cases across the state in different counties. All of these cases were successfully prosecuted, including a Riverside County case where the Court awarded the AG \$232,500 in civil penalties and \$13,700 for victim restitution.

In October 2005, the AG filed 2 cases to address the problem of the lack of access to persons with disabilities at polling sites. This is a pervasive problem around the country. In the March 2002 elections, the AG started to conduct access surveys throughout the state. After the November 2002 General Election, the AG identified that Kern and Santa Cruz counties in particular were not in compliance with applicable state and federal physical disability access requirements.

For the 2004 Primary and General Elections, the AG retained experts to survey the polling sites used by these two counties and found that they were also in violation of access laws. Negotiations between the AG & the Counties failed and thus in October 2005, the AG filed lawsuits against each county. The AG seeks to insure that both counties follow state law election code mandates requiring counties to provide accessible facilities which comply with the Secretary of State's guidelines as well as the Americans with Disabilities Act.

Santa Cruz County has been aggressive in its defense and removed the case to federal court. The AG is defending a Motion to Dismiss filed by Santa Cruz County. The AG succeeded in remanding state claims back to state court but it now has litigation against Santa Cruz County in two different venues. The AG hopes to use the Santa Cruz and Kern County cases as examples for other counties. A/ELAS Noel asked Verdugo who would be arguing on the behalf of the AG. Verdugo replied, Angela Sierra.

Verdugo reported that in *Chamber of Commerce of the United States v. Lockyer*, the US Chamber of Commerce challenged a recent California law (AB 1889, Stats, 2000) which stated that certain recipients of state funding could not use that funding to oppose or support unionization of its workforce. The Chamber asserted that this law was unconstitutional and violated the National Labor Relations Act. The District Court ruled in the Chamber's favor. The AG appealed to the Ninth Circuit. The initial 3 judge Ninth Circuit panel ruled against the AG 3 to 0. The AG filed petitions for rehearing and the Court issued a new decision ruling against the AG, 2 to 1. The AG filed a petition for the matter to be reheard en banc, which the Ninth Circuit granted. A 15 judge panel will hear oral argument on March 21 in San Francisco. There was an intervenor siding with the AG. The American Federation of Labor was also involved with the case.

The Commission thanked Verdugo for his report.

25 YEARS STATE SERVICE AWARD PRESENTATION

Chairman Woolverton asked DFEH Director Suzanne Ambrose to join the Commission and staff in presenting Acting ELAS Ann Noel a gift and a certificate, which was signed by the Governor and the Secretary of State, in recognition of Noel's 25 years of state service.

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING'S REPORT

DFEH Director Suzanne Ambrose introduced herself to Commissioner Adams. Ambrose reported on Department news regarding staffing, budget and other issues.

Ambrose reported that all four of the Department's Regional Administrators have recently been appointed. With administrators in place, she hopes that the Department will start making real progress in the quality and timeliness of DFEH investigations and the overall management of the enforcement division, where enforcement is 90 percent of the Department's budget.

The Governor has proposed to augment DFEH's budget. The Department has put forth three Budget Change Proposals (BCPs) for technology upgrades to automate issuing "right to sue" letters and scheduling, for printing materials and for hiring additional staff.

DFEH's Communication Center (CC) had purchased a whole new phone system when the Department moved headquarters. The CC can now generate reports, which indicate how long callers are waiting; how many calls are abandoned; and how long a specific person is on the phone per call. Average wait time in January was down to 4.25 minutes on the English line and 2.38 minutes on the Spanish line.

In 2000 and 2001, the Department paid outside mediators to settle cases. Last year it implemented a voluntary mediation program, where 31 people have volunteered to help the Department mediate cases. Commission Administrative Law Judges also mediate cases in the San Francisco Bay Area.

The Department has set up outreach and education programs with public service announcements (PSAs) in both English and Spanish to be broadcast via California radio stations.

Commissioner St. Hilaire asked Ambrose what was the overall message of the PSAs. Ambrose replied that the PSAs are available on the Department's website. She further explained that both PSAs are 30 second "spots", which state that discrimination is against the law and give some examples about types of discrimination and how to contact the Department. Commissioner St. Hilaire asked Ambrose to what media markets are the PSAs being distributed. Ambrose replied that the PSAs are being distributed to all California radio stations. The Department is also hoping to do some television PSAs, but these cost a lot more money. Commissioner St Hilaire suggested that the Department should re-release the PSAs to coincide with each city, where we will be holding our Commission meetings for this year. Acting ELAS Noel stated that this was a superb suggestion. Chairman Woolverton and Ambrose concurred. Noel and Ambrose agreed to implement Commissioner St. Hilaire's suggestion.

Acting ELAS Noel asked Ambrose if a caller's complaint can be screened to determine jurisdiction under the Fair Employment and Housing Act by the Department's new automated telephone system. Ambrose replied that she envisions the system will be designed where the caller will have to answer the "screening" questions prior to getting transferred to the appointment bank. The Department's philosophy is to "screen in" not "out". The Communication Center is composed of clerical personnel not investigators. The district office does the probing not the phone

ACTING EXECUTIVE AND LEGAL AFFAIRS SECRETARY'S (ELAS) ACTIVITY REPORT

Acting ELAS Noel discussed the following items from the ELAS Activity Report:

Budget: The Commission's four Budget Change Proposal's for the 2006-07 budget year seeking an additional \$68,000 for Commissioners travel to Commission meetings, IT consulting support, Administrative Law Judge (ALJ) mediation travel, and continuing ALJ legal education, while approved by State and Consumer Services Agency, were rejected by the Department of Finance. Staff anticipates that its 2006-07 budget will be approved with no further augmentation or reductions.

FEHC Website: The Commission's website is up and running. This was pivotal to the beginning of the rulemaking process for the Commission's proposed regulations on harassment training and education.

Commissioner Photographs: The Commission will include photographs of those Commissioners interested in having their photographs posted on the website. The Commission had consulted a San Francisco photographer and arranged a photography session for the Commissioners the day before and the morning of this Commission meeting.

Mediation, Adjudication and Settlement Conferences: Since the last Commission meeting, Commission ALJs have presided in 35 days of contested hearings, (in January 2006 the Commission had an 11 additional hearing days), have conducted 10 settlement conferences and mediations, and have handled 4 law and motion matters. Beginning in 2006, the Commission will track separately in-person hearing days and telephonic conferences.

Dates for Upcoming Commission Meetings: The upcoming dates have been set on Tuesdays of this year for April 25th-Fresno, June 6th-Los Angeles, August 29th-San Diego, and November 14th-Sacramento.

Customer Service Initiative: State and Consumer Services Agency has launched an agency-wide "Customer Service Initiative" (CSI) to improve customer service in state government. Agency asked each of its constituent departments and agencies to create a Customer Service Plan and designate as the Commission's "point person" on this initiative. Acting ELAS Noel and ALJ Frankfurt, working with the rest of the Commission staff, developed a Commission Customer Service Plan. Noel and Frankfurt have also attended CSI meetings in Sacramento on September 2 and December 2, 2005.

New State and Consumer Service Agency Secretary Rosario Marin: The Governor's office sent out a press release yesterday announcing the appointment of the new Agency Secretary Rosario Marin. Noel had notified the Commissioners about this news via email. Marin replaced Fred Aguirre, who was appointed by the Governor a month ago to be Cabinet Secretary.

Noel welcomed Marin to the SCSA and looks forward to working with her. Noel will be meeting Marin on Friday at the Agency Director's meeting in Sacramento.

New Commission Executive Assistant Loc D. Tra: Acting ELAS Noel formally introduced and welcomed the Commission's new Executive Assistant Loc Tra. Tra previously worked for the Secretary of State and the Commission is very pleased that he joined the FEHC.

Outreach and Education:

October 15, 2005, ALJ Jo Anne Frankfurt spoke on sexual harassment training at the annual State Bar Labor and Employment Section conference in Anaheim, California.

October 18, 2005, Commissioner Linda Ng and A/ELAS Ann Noel spoke at a DFEH press conference and celebration commemorating the 25th anniversary of the FEH Act and the separate creation of the Department and the Commission.

October 24, 2005, ALJ Jo Anne Frankfurt organized and participated in a panel at Hastings College of the Law on career opportunities in labor and employment law for law students, sponsored by the Diversity Committee of the Labor and Employment Section of the State Bar. Judge Frankfurt is organizing a similar panel for Southern California law students.

November 16, 2005, A/ELAS Ann Noel and ALJ Caroline Hunt spoke at the Central California Employer's Roundtable in Fresno on the Commission's proposed regulations on harassment training and education.

In addition to the public speaking above, all judges attended two training seminars, on *September 16-17, 2005*, sponsored by the California Employment Lawyers Association, and on *October 14-15, 2005*, sponsored by the California State Bar's Labor and Employment Law section. Both seminars covered recent updates in employment law in California.

Commissioner Confirmation: From the information Noel received from the Senate Rules Committee staff, three Commissioners who have been appointed in the last year, Commissioners Patrick Adams, Linda Ng and Brenda St. Hilaire were to be confirmed "on consent" on February 1, 2006.

Commission Press: Noel pointed out but did not further discuss recent Commission press articles included in the mailout.

HARASSMENT TRAINING REGULATIONS

- a. Regulation Process
- b. Public Hearings

A/ELAS Ann Noel gave the Commission an overview of what to expect later in the

afternoon. The Commission has an agenda of speakers scheduled to speak from 1:00 p.m. to 3:30 p.m., with 10 minutes allotted to each speaker. Noel anticipated that there

would be some walk-ins, as well. Speakers were encouraged ahead of time to show up early, to bring 10 copies of the written remarks, and to reference their remarks to the section number of the proposed regulations.

LEGISLATION

ALJ Jo Anne Frankfurt reported on her January 2006 legislative update, stating that the update summarizes the bills that were passed in the last session and gives pertinent dates in this session for new legislation.

A/ELAS Noel added that it was very early in the legislative process and that all of the bills were not introduced yet. An update of all new bills will be included in the next Commission meeting mailout.

ETHICS

ALJ Caroline Hunt reminded Commissioners to complete the ethics training. This training is mandatory and must be done biannually or within 6 months of appointment.

Chairman Woolverton stressed to the Commission that the training must be done before the next meeting

A/ELAS Noel pointed that out the ethics training is an e-learning program.

PUBLIC COMMENTS

California Teachers Association liaison Karla Davis introduced herself and spoke about state educational funding.

EXECUTIVE AND LEGAL AFFAIRS SECRETARY SELECTION PROCESS

The Commission discussed and agreed to set up dates for the ELAS selection process in San Francisco for Friday, February 24, 2006 at the Hiram Johnson State Building and Saturday, February 25, 2006 at Chairman Woolverton's downtown office.

Chairman Woolverton moved, Commissioner Adams seconded, and the Commission motioned to close Open Session at 11:23 a.m. (06-02)

The Commission took a 10 minute recess.

CLOSED SESSION

The Commission entered Closed Session at 11:36 a.m. Only the Chairman, Commissioners, Commission staff, and deputy Attorney General Louis Verdugo were present.

The Commission discussed hearings and litigation and deliberated on pending cases.

a. Supreme Court and Appellate Courts

Albertson's Inc. v. FEHC

Chairman Woolverton motioned, Commissioner Rosenthal seconded, and the Commission voted 5:0 to request that the Court of Appeal certify this case for publication. (06-03)

The microphones were turned off at 11:42 a.m.

b. Post-Decision

A/ELAS Noel recommended and the Commission agreed on a vigorous tracking of its decisions to ensure that Commission orders are quickly reduced to judgment by the AG's office and enforced by the Department.

(1) DFEH v. E & O Construction (Harper)

This case is assigned to Deputy AG Kathy Mikkelsen for enforcement. The Commission will keep this on the agenda and report on its progress at the next Commission meeting.

(2) DFEH v. Wal-Mart (Carver) (Wal-Mart I)

Wal-mart has fully complied with the Commission's order.

(3) DFEH v. Simi Valley Ford (Darby)

Deputy AG Kathy Mikkelsen is also assigned to this case.

c. Administrative Adjudication: Pending Decisions

(1) DFEH v. Marion's Place (Arreola)

Chairman Woolverton motioned, Commissioner Rosenthal seconded, and the Commission voted 5:0 to adopt the proposed decision in the above matter (06-04) as well as designating the decision as precedential. (06-05)

(2) DFEH v. St. Julius Lewis (Maxwell & Johnson)

Chairman Woolverton motioned, Commissioner Rosenthal seconded, and the Commission voted 5:0 to issue a Notice of Opportunity for Further Argument (NOFA) to modify the proposed decision. (06-06)

(3) DFEH v. CATERON, et al (Benjamin)

Chairman Woolverton motioned, Commissioner Rosenthal seconded, and the Commission voted 3:2 to issue a NOFA. (06-07) Both Commissioners Adams and St. Hilaire dissented wanting to adopt the Proposed Decision.

Chairman Woolverton motioned, Commissioner Adams seconded and the Commission moved to end Closed Session and adjourned the meeting. (06-08)

ADJOURNMENT

The Commission adjourned its meeting at 12:21 p.m.

Date: February 1, 2006

GEORGE WOOLVERTON

Chairman

**REPORT OF TRANSACTIONS
OF THE 459th COMMISSION MEETING
February 1, 2006
San Francisco, California**

THE COMMISSION AT THIS MEETING TOOK THE FOLLOWING ACTIONS:

- 06-01 Approved the Minutes and Transactions of the 458th meeting as submitted.
- 06-02 Voted 5:0 to close Open Session.
- 06-03 Voted 5:0 to request that the Court of Appeal certify the Albertson's Inc. v. FEHC decision for publication.
- 06-04 Voted 5:0 to adopt the proposed decision in DFEH v. Marion's Place (Darby).
- 06-05 Voted 5:0 to designate DFEH v. Marion's Place (Darby) as precedential.
- 06-06 Voted 5:0 to issue a NOFA in DFEH v. St. Julius Lewis (Maxwell & Johnson).
- 06-07 Voted 3:2 to issue a NOFA in DFEH v. CATERON, et al (Benjamin).
Commissioners Adams and St. Hilaire dissented.
- 06-08 Voted to end Closed Session and adjourn the meeting.

Prepared By

Loc D. Tra
Clerk of the Commission